

**U.S. Department of Labor**

Office of Administrative Law Judges  
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**Issue Date: 18 March 2005**

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In the Matter of:

**LYNETTA L. TURNER**, widow of  
and on behalf of  
**EUGENE TURNER**, deceased  
Claimant,

v.

**Case No. 2003-BLA-00247**  
**2003-BLA-06367**

**L B J ENERGY COMPANY/**  
**LIBERTY MUTUAL INSURANCE CO.,**  
Employer/Carrier, and

**DIRECTOR, OFFICE OF WORKERS'**  
**COMPENSATION PROGRAMS,**  
Party in Interest.

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Appearances:

Ron Carson, Lay Representative, Stone Mountain Health Services, Saint Charles, VA  
For Claimant

Robert Himmel, Esq., Gentry Locke Rakes & Moore, LLP, Roanoke, VA  
For Employer

Before: PAMELA LAKES WOOD  
Administrative Law Judge

**DECISION AND ORDER DENYING BENEFITS**

This proceeding arises from a survivor's claim for benefits under the Black Lung Benefits Act, 30 U.S.C. §901, *et. seq.* ["the Act"] filed by Claimant Lynetta L. Turner ["Claimant"] on August 26, 2002 [hereafter "Widow's Claim"] based upon the death of her husband, deceased miner Eugene Turner ["Miner"], together with a modification request related to the Miner's January 7, 1997 claim that was brought during his lifetime [hereafter "Miner's Claim"]. The two claims have been consolidated for hearing. The putative responsible operator

is L B J Energy Inc. ["Employer"] and the insurance carrier is Liberty Mutual Insurance Co. ["Carrier"].

Part 718 of title 20 of the Code of Federal Regulations is applicable to both claims, as they were filed after March 31, 1980, and the regulations amended as of December 20, 2000 are applicable to the Widow's claim, as the Widow's claim was filed after January 19, 2001.<sup>1</sup> 20 C.F.R. §718.2. In *National Mining Assn. v. Dept. of Labor*, 292 F.3d 849 (D.C. Cir. 2002), the U.S. Court of Appeals for the D.C. Circuit rejected the challenge to, and upheld, the amended regulations with the exception of several sections.<sup>2</sup> The Department of Labor amended the regulations on December 15, 2003, solely for the purposes of complying with the Court's ruling. 68 Fed. Reg. 69929 (Dec. 15, 2003).

The findings of fact and conclusions of law hereafter are based upon my analysis of the entire record, except as limited below in view of the new evidentiary limitations. Where pertinent, I have made credibility determinations concerning the evidence.

### STATEMENT OF THE CASE

Claimant Lynetta Turner ("Claimant") filed the instant claim for survivor's benefits ("Widow's claim") on August 26, 2002, based upon the death of her husband, Eugene Turner, on June 12, 2002 (WDX2).<sup>3</sup> In a Schedule for the Submission of Additional Evidence, a claims examiner concluded that based on the evidence of record at that time, the Claimant would not be entitled to benefits and the Employer was the responsible operator. (WDX17). On April 10, 2003 the District Director issued a Proposed Decision and Order Denial of Benefits. (WDX25). The District Director found that although the Miner contracted pneumoconiosis as a result of his coal mine work, the disease did not cause his death within the meaning of the Act. *Id.* Claimant appealed by her representative's letter of May 6, 2003, and the claim was referred to the Office of Administrative Law Judges for a hearing on July 24, 2003. (WDX27, 31).

At the time of his death, the deceased Miner's request for modification of the denial of his January 7, 1997 claim for benefits was pending. The Miner first filed for Black Lung Benefits on December 15, 1993; that claim was withdrawn and the withdrawal approved by the district director (MDX28).<sup>4</sup> On January 7, 1997, the Miner filed the instant application for Black Lung Benefits. (MDX1). By a Notice of Initial Finding of June 8, 1997, the district director determined that the Miner was eligible for benefits under the Act and asked the Employer to assume payment of benefits on September 11, 1997. (MDX22, 25). The Employer declined to do so; benefit payments were initiated by the Black Lung Disability Trust Fund; and the case was referred for a hearing on November 12, 1997. (MDX 27, 29, 30). A hearing was held before Administrative Law Judge Lawrence P. Donnelly on March 11, 1998. (MDX33). Judge

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<sup>1</sup> Section and part references appearing herein are to Title 20 of the Code of Federal Regulations unless otherwise indicated.

<sup>2</sup> Several sections were found to be impermissibly retroactive and one (which attempted to effect an unauthorized cost shifting) was not upheld by the court. One of the impermissibly retroactive sections is discussed under the section of this decision relating to the disability causation issue in the Miner's claim.

<sup>3</sup> Director's Exhibits 1 through 31 for the Widow's Claim will be referenced as "WDX1" through "WDX31" and Director's Exhibits 1 through 59 relating to the Miner's Claim will be referenced as "MDX1" through "MDX59."

<sup>4</sup> As the 1993 claim was withdrawn, it is considered not to have been filed under 20 C.F.R. §725.306(b).

Donnelly issued a “Decision and Order – Awarding Benefits” on January 22, 1999. (MDX36). Judge Donnelly credited the Miner with 24 years of coal mine employment. *Id.* On appeal, in a Decision and Order of February 23, 2000, the Benefits Review Board affirmed in part and vacated in part Judge Donnelly’s decision and remanded the case for further proceedings. (MDX41). The Board affirmed Judge Donnelly’s finding of pneumoconiosis based upon the x-ray evidence and declined to address the Employer’s arguments on the medical opinion evidence, finding the x-ray evidence alone to be sufficient.<sup>5</sup> *Id.* The Board also noted that the parties had stipulated to total disability. *Id.* However, the Board vacated Judge Donnelly’s finding that the Miner’s total disability was due to pneumoconiosis because he “improperly substituted his opinion for that of Dr. Hippensteel” and “failed to adequately address whether Dr. Robinette’s opinion is sufficiently reasoned.” *Id.* Due to the unavailability of Judge Donnelly, the case was transferred to Administrative Law Judge Clement J. Kichuk, who issued a “Decision and Order on Remand – Denying Benefits” on October 31, 2000 based upon the Miner’s failure to establish disability causation, because he credited Dr. Hippensteel over Dr. Robinette. (MDX45). By a Decision and Order of November 7, 2001, the Board affirmed Judge Kichuk’s denial of benefits. (MDX49).

On October 3, 2002, following the Miner’s death, the Claimant submitted additional evidence, which was apparently interpreted as a request for modification (MDX51, 52, 55).<sup>6</sup> In a “Proposed Decision and Order Denying Request for Modification” of April 10, 2003, the district director found that although disease and causality had already been established, the preponderance of evidence indicated that the Miner’s disability was not due to pneumoconiosis and “[t]he evidence fails to show a change in condition since the prior decision and fails to show that a mistake was made in making the prior decision.” (MDX55). The Claimant appealed by her representative’s letter of May 6, 2003, and the Miner’s claim was transmitted for a hearing on July 24, 2003. (MDX59).

A hearing in the above-captioned matter was held on March 2, 2004 in Abingdon, Virginia.<sup>7</sup> At the hearing, Director’s Exhibits 1 through 31 for the Widow’s Claim (“WDX1” through “WDX31”); Director’s Exhibits 1 through 59 for the Miner’s Claim (“MDX1” through “MDX59”); Claimant’s Exhibit 1 (“CX1”); and Employer’s Exhibits 1 through 3 (“EX 1” through “EX 3”) were admitted into evidence. Claimant Lynetta Turner was the only witness to testify. At the end of the hearing, the record closed.<sup>8</sup>

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<sup>5</sup> The Board’s approach is inconsistent with the Fourth Circuit’s later decision in *Island Creek Coal Co. v. Compton*, 211 F.3d 302 (4th Cir. 2000). In *Compton*, the Fourth Circuit held that based upon the statutory language at 30 U.S.C. §923(b), all relevant evidence is to be considered together rather than merely within discrete subsections of 20 C.F.R. §718.202 (a)(1)-(4) in determining whether a claimant has met his or her burden of establishing the existence of pneumoconiosis by a preponderance of all of the evidence. The Board has held that a prior finding of pneumoconiosis before the establishment of the *Compton* standard is not identical (for the purposes of collateral estoppel) to current findings of pneumoconiosis, due to the change in the standard of proof. *Surway v. United Pocahontas Coal Co.*, BRB No. 01-0881 BLA (Jun. 26, 2002) (unpub.) Thus, there is no basis for collateral estoppel on the pneumoconiosis issue.

<sup>6</sup> No written request for modification is of record in the Miner’s claim.

<sup>7</sup> References to the hearing transcript of the March 2, 2004 hearing appear as “Tr.” followed by the page number.

<sup>8</sup> A Prehearing evidence designation form was submitted by the Employer but none was submitted on behalf of the Claimant, even though the Claimant’s representative agreed to submit one following the hearing. (Tr. 16). As the evidentiary limitations have not been exceeded by the Claimant’s submissions, I will not delay proceedings further

## **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

### **Issues/Stipulations**

At the hearing, the Employer withdrew the issues of responsible operator and length of coal mine employment.<sup>9</sup> Thus, the issues in the Miner's claim are as follows: the existence of pneumoconiosis, the causal relationship between pneumoconiosis and coal mine employment, total disability, causation of total disability, and the threshold issue of modification. (MDX59). In the Widow's claim, the issues are the existence of pneumoconiosis, the causal relationship between pneumoconiosis and coal mine employment, and the causation of the miner's death; the issue of total disability was apparently listed in error (WDX31; Tr. at 8).

### **Medical Evidence**

The medical evidence submitted in connection with the Widow's claim consists of the interpretation of x-rays taken on February 3, 1998 by Paul Wheeler, M.D.; the autopsy examination report by Joseph Segen, M.D.; an interpretation of the autopsy slides and other evidence by Richard L. Naeye, M.D.; the medical opinion report of Gregory J. Fino, M.D. dated December 18, 2002; the Miner's death certificate, dated June 12, 2000 and signed by Wailid Saado, M.D.; and the Miner's hospital records.

In addition to the above, evidence submitted in connection with the Miner's modification request includes the interpretation of x-rays taken on March 10, 1999 by Michael S. Alexander, M.D. and February 6, 2001 by Larry H. Westerfield, M.D.; the results of a pulmonary function study conducted on February 5, 2002; and additional medical records relating to the Miner, including diagnoses by Walid Saado, M.D. and Joseph Smiddy, M.D. I will consider this evidence in connection with the Widow's claim to the extent that the evidentiary limitations have not been exceeded.

The effect of the evidentiary limitations (appearing in the amended regulations) upon my consideration of the evidence is discussed below.

### **Background and Employment History**

Claimant testified that she is the widow of the deceased miner, Eugene Turner, having lived with him since the time of their December 28, 1996 marriage. (Tr. 8). The Miner was born in December of 1948 and died on June 12, 2002 at the age of 53. (Tr. 9). Claimant testified that the Miner worked approximately 23 years in the mines, ending in September 1993, when he was laid off. (Tr. 9-11). He told her about his work inside the mines as a utility worker and machine operator, and he indicated that he had to be moved to lighter duty work because he couldn't keep up with the other workers. (Tr. 10). After he retired, his health continually worsened and he was

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to await submission of a form. The applicability of the evidentiary limitations to the instant case is discussed in detail below.

<sup>9</sup> The Director found 20.21 years of coal mine employment in connection with the Widow's claim. (WDX17). In the Miner's claim, Judge Donnelly credited the Miner with 24 years of coal mine employment (MDX36).

sleeping on two pillows and used oxygen “24/7.” (Tr. 11-12). He was hospitalized in 1997 and was on a ventilator for 11 days. (Tr. 12). At the time she married him, he had a breathing problem, including wheezing and shortness of breath. (Tr. 12). However, they were initially able to take vacations and go shopping. (Tr. 13). It got to the point where he would sit in the car and wait while she went to get groceries. (Tr. 13-14). He couldn’t do yard work and could hardly walk from their bed to the bathroom without becoming short of breath. (Tr. 12). By the time he died, they would stay home most of the time, but they were camping at the time of his death. (Tr. 13-14). During the time that she and the Miner were together, he would smoke on and off, quitting periodically. (Tr. 11). As far as she knew, he had quit smoking permanently by approximately 15 months prior to his death, at the time of his March 2001 hospitalization. (Tr. 11). The Miner’s treating physician toward the end of his life was Dr. Walid Saado from Pound Clinic. (Tr. 13). Dr. Saado treated the Miner for his breathing and put him on various kinds of breathing medications and inhalants. (Tr. 13).

The Miner’s death certificate reflects that he died on June 12, 2002 due to cardio-pulmonary arrest resulting from lung cancer, which was in turn due to pneumoconiosis; chronic obstructive pulmonary disease was listed as another significant condition contributing to death. (DX9).

Records from Southwest Virginia Regional Cancer Center in Norton, Virginia reflect that the Miner was diagnosed with lung cancer (squamous cell carcinoma) with metastases in July 2001. (CX1). A 40 pack year smoking history is also documented. *Id.* The Miner’s medical records also reflect treatment for a number of conditions, including pneumoconiosis and chronic obstructive pulmonary disease, and indicate that he was oxygen-dependent. (CX1; MDX 51).

The Miner testified before Judge Donnelly on March 11, 1998. (MDX33). He testified that he worked about 23 years in the mines, ending in 1993, and that his last job was as a utility worker for L B J, for which he had worked for a little over two years. *Id.* at 9. As a utility worker, he would “scatter rock dust, scrape and clean places, build brattices, stuff like that.” *Id.* He also worked as a roof bolter operator, placing roof bolts in the ceiling of the underground mine. *Id.* at 11. He was placed on utility work because he “didn’t have the breath to keep up with the miner, keep the top bolted.” *Id.* The Miner testified that he had first noticed breathing problems 15 or 20 years before. *Id.* at 12. The first doctor he saw for his breathing problems was Dr. Ratliff in Clintwood. *Id.* At the time of the 1998 hearing, Dr. Sardo (sic) was treating him for his breathing problems, and Dr. Sardo (sic) referred him to Dr. Smiddy. *Id.* at 13. On cross examination, the Miner admitted to smoking about one and one-half packs of cigarettes for 20 to 25 years until he quit, a little over a year before. *Id.* at 17.

## **Discussion and Analysis**

### **Evidentiary Limitations**

My consideration of the medical evidence in the Widow’s claim is limited under the regulations, which apply evidentiary limitations to all claims filed after January 19, 2001, including survivor’s claims. 20 C.F.R. §725.414. Section 725.414, in conjunction with Section 725.456(b)(1), sets limits on the amount of specific types of medical evidence that the parties can

submit into the record. *Dempsey v. Sewell Coal Co.*, 21 BLR --, BRB No. 03-0615 BLA (June 28, 2004) (en banc) (slip op. at 3), *citing* 20 C.F.R. §§725.414; 725.456(b)(1). Under section 725.414, the claimant and the responsible operator may each “submit, in support of its affirmative case, no more than two chest X-ray interpretations, the results of no more than two pulmonary function tests, the results of no more than two arterial blood gas studies, no more than one report of an autopsy, no more than one report of each biopsy, and no more than two medical reports.” *Id.*, *citing* 20 C.F.R. §725.414(a)(2)(i),(a)(3)(i). In rebuttal of the case presented by the opposing party, each party may submit “no more than one physician's interpretation of each chest X-ray, pulmonary function test, arterial blood gas study, autopsy or biopsy submitted by” the opposing party “and by the Director pursuant to §725.406.” *Id.*, *citing* 20 C.F.R. §725.414(a)(2)(ii), (a)(3)(ii). Following rebuttal, each party may submit “an additional statement from the physician who originally interpreted the chest X-ray or administered the objective testing,” and, where a medical report is undermined by rebuttal evidence, “an additional statement from the physician who prepared the medical report explaining his conclusion in light of the rebuttal evidence.” *Id.* “Notwithstanding the limitations” of section 725.414(a)(2),(a)(3), “any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease, may be received into evidence.” *Id.*, *citing* 20 C.F.R. §725.414(a)(4). Medical evidence that exceeds the limitations of Section 725.414 “shall not be admitted into the hearing record in the absence of good cause.” *Id.*, *citing* 20 C.F.R. §725.456(b)(1). The parties cannot waive the evidentiary limitations, which are mandatory and therefore not subject to waiver. *Phillips v. Westmoreland Coal Co.*, 2002-BLA-05289, BRB No. 04-0379 BLA (BRB Jan. 27, 2005) (unpub.) (slip op. at 6).

The Benefits Review Board discussed the operation of these limitations in its en banc decision in *Dempsey*, *supra*. First, the Board found that it was error to exclude CT scan evidence because it was not covered by the evidentiary limitations and instead could be considered “other medical evidence.” *Dempsey* at 5; *see* 20 C.F.R. § 718.107(a) (allowing consideration of medical evidence not specifically addressed by the regulations). Further, the Board found that it was error to exclude pulmonary function tests and arterial blood gases derived from a claimant’s medical records simply because they had been proffered for the purpose of exceeding the evidentiary limitations. *Dempsey* at 5. However, the Board found that records from a state claim were properly excluded as they did not fall within the exception for hospitalization or treatment records or the exception for prior federal black lung claim evidence (under 20 C.F.R. §725.309(d)(1)). *Dempsey* at 6. On the issue of good cause for waiver of the regulations, the Board noted that a finding of relevancy would not constitute good cause and therefore records in excess of the limitations offered on that basis, and on the basis that the excluded evidence would be “helpful and necessary” for the reviewing physicians to make an accurate diagnosis, were properly excluded. *Id.* at 6. Finally, the Board stated that inasmuch as the regulations do not specify what is to be done with a medical report that references inadmissible evidence, it was not an abuse of discretion to decline to consider an opinion that was “inextricably intertwined” with excluded evidence. *Id.* at 9. Referencing *Peabody Coal Co. v. Durbin*, 165 F.3d 1126, 21 BLR 2-538 (7th Cir. 1999), the Board acknowledged that it was adopting a rule contrary to the common law rule allowing inadmissible evidence to be considered by a medical expert, because “[t]he revised regulations limit the scope of expert testimony to admissible evidence.” *Dempsey* at 9-11.

As the Board noted, the regulations specifically allow evidence from a prior claim to be considered in connection with a later claim, so that a determination may be made whether there has been a material change in conditions since the time of the prior claim. 20 C.F.R. §725.309(d)(1). Thus, with respect to the Miner's claim, all of the evidence that was previously of record may be considered. However, there is no such provision applicable to survivor's claims that would allow consideration of the evidence developed in the miner's claims, absent a finding of good cause.

Consistent with the above limitations and the Board's decision in *Dempsey*, other administrative law judges have generally excluded evidence developed in connection with a miner's claim from consideration in a surviving spouse's claim to the extent that the limitations have been exceeded. See *Brewster v. Consolidation Coal Co.*, 2004-BLA-05361 (ALJ Solomon Feb. 16, 2005) (finding evidence from miner's claim unduly repetitious and finding no good cause to exceed limitations); *Duncan v. West Coal Corp.*, 2004-BLA-05355 (ALJ Miller Jan. 18, 2005) (noting strong policy reasons for excluding evidence from a miner's claim in a survivor's claim, which is "an independent claim subject to independent analysis"); *Howard v. P & C Mining Co.*, 2003-BLA-05436 (ALJ Kane Dec. 29, 2004) (excluding excess evidence except for treatment records and prohibiting rebuttal to treatment records); *Griffin v. Island Coal Company*, 2003-BLA-5503 (ALJ Phalen July 22, 2004) (excluding excess reports, excess test results, and deposition testimony relying upon inadmissible evidence). However, Administrative Law Judge Robert L. Hillyard found good cause for consolidating a miner's claim with a survivor's claim and for exceeding the evidentiary limitations in the consolidated claims, in *Clark v. Peabody Coal Company*, 2002-BLA-05114 (ALJ Hillyard, Nov. 30, 2004).

There are inherent problems in considering two different groups of evidence and possibly reaching inconsistent rulings in consolidated cases involving claims brought by miners during their lifetimes and their survivors' claims. Thus, in amending the regulations, the Department of Labor did not disturb the provision relating to consolidation of claims appearing in 20 C.F.R. §725.460:

When two or more hearings are to be held, and the same or substantially similar evidence is relevant and material to the matters at issue at each such hearing, the Chief Administrative Law Judge may, upon motion by any party or on his or her own motion, order that a consolidated hearing be conducted. Where consolidated hearings are held, a single record of the proceedings shall be made and the evidence introduced in one claim may be considered as introduced in the others, and a separate or joint decision shall be made, as appropriate. [Emphasis added.]

However, in view of the authority cited above, I will not consider the evidence from the Miner's claim with respect to each category of evidence for which there are limitations. Instead, I will consider evidence from the Miner's claim that does not fall within the particular limitations for that category of evidence as "other evidence" for consideration with respect to each issue to be addressed. In the interest of consistency, I find good cause for consideration of the evidence from the Miner's claim to this limited extent.

Although the medical evidence submitted in connection with the instant Widow's claim is in compliance with the evidentiary limitations, certain medical reports by Drs. Fino and Naeye, while not exceeding the evidentiary limitations, reference evidence that is not otherwise admissible, contrary to section 718.414. Both subsection (a)(2)(i) (relating to evidence admissible on behalf of a claimant) and (a)(3)(i) (relating to evidence admissible on behalf of a responsible operator) provide the following:

. . . Any chest X-ray interpretations, pulmonary function test results, blood gas studies, autopsy report, biopsy report, and physicians' opinions that appear in a medical report must each be admissible under this paragraph [providing the limitations] or paragraph (a)(4) of this section [allowing admission of "any record of a miner's hospitalization for a respiratory or pulmonary or related disease, or medical treatment for a respiratory or pulmonary or related disease" notwithstanding the limitations in (a)(2) and (a)(3)]. . . .

As *Dempsey* noted, the section does not state what is to be done with a medical report that is not in compliance with this requirement and it would be within my discretion to exclude such a report if the physician's opinion were "inexplicably intertwined" with the inadmissible evidence. Accordingly, I will consider the extent to which the impermissible evidence is inextricably intertwined with the expert's medical opinion (whether stated in a report or at a deposition) and whether there is nevertheless good cause for consideration of the evidence when addressing the merits of the claim.

### **Widow's Claim**

To prevail in a survivor's claim for Black Lung benefits, a Claimant must establish that the miner had pneumoconiosis; that the miner's pneumoconiosis arose out of coal mine employment; and that the miner's death was due to pneumoconiosis. 20 C.F.R. §718.205. For survivor's claims filed on or after January 1, 1982, the miner's death will be considered due to pneumoconiosis if pneumoconiosis was the cause of the miner's death, it was a substantially contributing cause or factor leading to the miner's death, or death was caused by complications of pneumoconiosis. Pneumoconiosis is deemed to be a substantially contributing cause of death if it hastened the miner's death. 20 C.F.R. §718.205(c)(5). Causation may also be established presumptively, under the presumptions relating to complicated pneumoconiosis, set forth at §718.304. 20 C.F.R. §718.205 (c)(1)-(3).

The Supreme Court has made it clear that the burden of proof in a black lung claim lies with the claimant, and if the evidence is evenly balanced, the claimant must lose. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994). In *Greenwich Collieries*, the Court invalidated the "true doubt" rule, which gave the benefit of the doubt to claimants. Thus, in order to prevail in a black lung case, the claimant must establish each element by a preponderance of the evidence.

## Existence of Pneumoconiosis

For the purpose of the Act, “pneumoconiosis” means a chronic dust disease of the lung and its sequelae, including respiratory and pulmonary impairments, arising out of coal mine employment. This definition includes both medical or clinical pneumoconiosis and statutory or legal pneumoconiosis. 20 C.F.R. §718.201. Clinical pneumoconiosis consists of those diseases recognized by the medical community as pneumoconioses, *i.e.* the conditions characterized by permanent deposition of substantial amounts of particulate matter in the lungs and the fibrotic reaction of the lung tissue to that deposition caused by dust exposure in coal mine employment. *Id.* Legal pneumoconiosis is defined as “any chronic lung disease or impairment and its sequelae arising out of coal mine employment”; the regulations explain that “[t]his definition includes, but is not limited to, any chronic restrictive or obstructive pulmonary disease arising out of coal mine employment.” 20 C.F.R. §718.201(a)(2) (2002). The section continues by stating that “‘arising out of coal mine employment’ includes any chronic pulmonary disease or respiratory or pulmonary impairment significantly related to, or substantially aggravated by, dust exposure in coal mine employment.” *Id.* at §718.201(b).

Under 20 C.F.R. §718.202(a)(1)-(4), a finding of pneumoconiosis can be made based upon x-ray evidence, biopsy or autopsy evidence, presumption, or the reasoned medical opinion of a physician based on objective medical evidence.

**X-Ray Evidence.** Neither party designated x-ray evidence, although Employer submitted an x-ray reading that was considered in connection with the Widow’s claim and the Miner’s claim, and Claimant submitted two x-ray interpretations that were considered in connection with the modification request.<sup>10</sup> This x-ray evidence consists of (1) a February 27, 2003 reading by board certified radiologist and B-reader **Dr. Paul Wheeler** of a February 3, 1998 x-ray, which Dr. Wheeler found to be “completely negative” (WDX24); (2) a May 25, 1999 interpretation of a March 10, 1999 x-ray, which board certified radiologist and B-reader **Dr. Michael S. Alexander** found to show coal worker’s pneumoconiosis, category p/q, 2/2, ax [coalescence], pi [pleural thickening], and bilateral chest wall pleural thickening (mild) (MDX51); and (3) a February 6, 2001 x-ray reading by board certified radiologist and B-reader **Dr. Larry H. Westerfield** of an x-ray of the same date, which Dr. Westerfield read as positive for pneumoconiosis q/t, 1/2, all six zones, with a few hilar granulomatous calcifications (MDX51). Inasmuch as equally qualified readers disagreed as to the interpretation of x-rays, the x-ray evidence is not definitive. However, as the two most recent (1999 and 2001) x-rays were interpreted as positive, the x-ray evidence weighs in favor of a finding of pneumoconiosis, given the progressive nature of the disease. I find that Claimant has established the presence of the disease under 20 C.F.R. §718.202(a)(1).

**Autopsy or Biopsy Evidence.** The autopsy evidence consists of the autopsy examination report by Joseph Segen, M.D. and an interpretation of the autopsy slides and other evidence by Richard L. Naeye, M.D.

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<sup>10</sup> I have not considered references to x-ray findings in the medical records that are not in compliance with the quality standards in the regulations.

(1) **Joseph Segen, M.D.** was the autopsy prosector. In the autopsy report, Dr. Segen listed the following anatomic diagnoses:

- I. Moderately differentiated squamous cell carcinoma with necrosis and hemorrhage.
- II. Coal workers' pneumoconiosis, mild.
- III. Atherosclerosis, mild.
- IV. Early changes of myocardial ischemia.

Internal examination of the thoracic cavity revealed multiple foci of blackened pigment on the pleural surface and throughout the pulmonary parenchyma, and the right lung was remarkable for a firm rounded area measuring 2.5 centimeter in diameter surrounding the central bronchioles and extending peripherally approximately 5 centimeters. On Microscopic Description, Dr. Segen noted that, in addition to the findings of squamous cell carcinoma in the right lung with necrosis and hemorrhage, "[t]he remaining pulmonary parenchyma demonstrates changes of coal workers' pneumoconiosis with dust macules, focal emphysema, subpleural, interstitial, and perivascular fibrosis" accompanied by "intimal hyperplasia of the pulmonary vessels and anthracosilicotic nodules within the hilar lymph nodes and lymphoid tissue, in addition to extensive fibrosis and scarring." Heart failure cells and pulmonary hemorrhage were also noted. (WDX10, 24; EX2).

(2) **Richard L. Naeye, M.D.**, a board-certified pathologist, prepared a medical report for the Employer. Dr. Naeye's report of February 6, 2003 indicates that, in addition to the autopsy slides, death certificate, and medical records, he reviewed "medical information" from certain doctors offering opinions and x-ray interpretations. Thus, Dr. Naeye's report impermissibly references inadmissible evidence. However, in reviewing his report, I do not find his conclusions as to the interpretation of the autopsy slides to be inextricably intertwined with the impermissible information. Accordingly, I will consider Dr. Naeye's report apart from the proscribed references. Dr. Naeye diagnosed mild, simple coal worker's pneumoconiosis based upon anthracotic deposits of .2 to 1.0 mm. with associated fibrous tissue, which may be identified as anthracotic macules based upon their size. However, he noted two other disorders that were dominant in the lung tissue: "very severe centrilobular emphysema" and "poorly differentiated squamous cell carcinoma that is widely invasive and often admixed with a large amount of fibrous tissue and varying numbers of chronic and acute inflammatory cells." He opined that the CWP was "not severe enough to have caused any abnormalities in lung function, any disability, or to have had a significant role in his death" and that his "antecedent disability was mainly the consequence of his severe centrilobular emphysema and less severe chronic bronchitis." (WDX24, EX3).

Thus, both the autopsy prosector and the reviewing pathologist agreed that the Miner suffered from simple coal worker's pneumoconiosis. Accordingly, Claimant has established the presence of the disease under 20 C.F.R. §718.202(a)(2).

**Complicated Pneumoconiosis and Other Presumptions.** A finding of opacities of a size that would qualify as “complicated pneumoconiosis” under 20 C.F.R. §718.304 results in an irrebuttable presumption of total disability. As there is no evidence of complicated pneumoconiosis, the section 718.304 presumption is inapplicable. The additional presumptions described in section 718.202(a)(3), which are set forth in 20 C.F.R. §718.305 and 20 C.F.R. §718.306 are also inapplicable, *inter alia*, because they do not apply to claims filed after January 1, 1982 or June 30, 1982, respectively. Further, section 718.306 does not apply, because the miner did not die on or before March 1, 1978. Thus, Claimant has failed to establish the presence of pneumoconiosis under 20 C.F.R. §718.202(a)(3).

**Medical Opinions on Pneumoconiosis.** The following physicians provided medical opinions addressing the issue of whether Claimant has pneumoconiosis:

(1) **Gregory J. Fino, M.D.**, a board certified pulmonologist,<sup>11</sup> submitted a medical report dated December 18, 2002. (MDX24, EX1). Dr. Fino did not address the issue of whether the miner had clinical pneumoconiosis or CWP. On the issue of legal pneumoconiosis, he opined that the Miner had “a very severe obstructive ventilatory abnormality present that is due to cigarette smoking” and “that his years in the mines (there is no evidence that coal mine dust resulted in any obstructive lung disease), had nothing to do with this obstruction.” Dr. Fino determined that the Miner was “disabled because of obstructive lung disease and lung cancer due to smoking” and “[c]oal mine dust inhalation played no role, whatsoever, in his disability.” He also noted studies showing a decreased incidence of lung cancer in individuals who work in the mines and opined that there was no causal relationship between working in the mines and the development of lung cancer.

Dr. Fino’s report is hampered by the fact that he considered inadmissible evidence (including x-ray reports that are not of record) in rendering his opinion. In addition, he failed to consider significant admissible evidence, including the autopsy evidence. To the extent that his opinion may be extricated from the inadmissible evidence upon which it relies, I find it to be entitled to little if any weight because he did not consider the autopsy evidence.

(2) **Richard L. Naeye, M.D.**, the pathologist whose interpretation of the autopsy slides is discussed above, also reviewed additional records and expressed an opinion as to the appropriate diagnoses. As noted above, Dr. Naeye reviewed some evidence that exceeded the evidentiary limitations. Inasmuch as Dr. Naeye’s report primarily relies upon the pathological slides, the Miner’s medical records, and epidemiological evidence in reaching his conclusions, I do not find it to be inextricably intertwined with the inadmissible evidence. As noted above, Dr. Naeye found simple coal worker’s pneumoconiosis based upon the pathological slides and therefore found “clinical pneumoconiosis,” which was not severe enough to have caused any disability. On the issue of “legal pneumoconiosis,” he noted that the Miner also suffered from severe centrilobular emphysema and less severe bronchitis, and he noted “[t]he much larger role of smoking than of mine dust in the genesis of chronic bronchitis and centrilobular emphysema” but he did not go so far as to exclude coal dust exposure as a contributing or aggravating factor. He agreed with Dr. Fino that lung cancer was not associated with coal mine dust exposure. (EX3).

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<sup>11</sup> As used herein, a board-certified pulmonologist is a physician who is board-certified in internal medicine and the subspecialty of pulmonary diseases.

I do not find Dr. Fino's opinion to undermine Dr. Naeye's finding of clinical pneumoconiosis and I therefore find clinical pneumoconiosis to be established under subsection 718.202(a)(4). However, I find that the Claimant has failed to establish that the Miner also suffered from legal pneumoconiosis by a preponderance of the medical opinion evidence under the subsection.

**Other Evidence of Pneumoconiosis.** The other medical evidence developed in the Widow's claim consists of medical records from the Miner's treating physicians Walid Saado, M.D. and Joseph F. Smiddy, M.D.(MDX51); hospital records from Southwest Virginia Regional Cancer Center in Norton, Virginia (CX1); and the Miner's death certificate. In addition, evidence from the Miner's claim is also of record, as discussed above.

(1) **Walid Saado, M.D.** treated the Miner for various conditions. In a typed progress note of May 23, 2001, he indicated that he was treating the Miner for, inter alia: "Severe end-stage COPD. Cor pulmonale. Coronary artery disease with right sided heart failure." A typed progress note of June 20, 2001 also noted pneumoconiosis as well as possible pneumonia and right pleural effusion. On September 24, 2001, Dr. Saado noted that the Miner had lung cancer (post chemotherapy and radiation therapy) as well as acute exacerbation of bronchitis and COPD. His diabetes, which had previously been controlled, had become uncontrolled. (MDX51). Dr. Saado did not discuss the basis for his diagnoses or their etiology.

(2) **Joseph F. Smiddy, M.D.** In office notes dating from January 2001, Dr. Smiddy diagnosed coal worker's pneumoconiosis, interstitial lung scarring, chronic bronchitis, COPD, congestive heart failure, granulomatous lung disease, cardiomegaly, and other possible ailments. Subsequently, squamous cell carcinoma was added as a diagnosis. Dr. Smiddy also interpreted x-rays taken on January 15, 2001 and later as showing coal worker's pneumoconiosis and other findings but did not utilize the ILO system. (MDX51). Dr. Smiddy does not cite a basis other than the x-rays for his diagnosis and he does not discuss the etiology of the COPD and chronic bronchitis.

(3) Records from Southwest Virginia Regional Cancer Center in Norton, Virginia reflect that the Miner was diagnosed with lung cancer (squamous cell carcinoma) with metastases in July 2001. (CX1). A consultation note of August 7, 2001 by George Savides, M.D. reflects a history of "known pneumoconiosis, chronic obstructive pulmonary disease, and granulomatous lung disease" and referral by his pulmonologist, Dr. Joseph Smiddy *Id.* The note also indicated that the Miner had quit smoking six months before and, although he was a heavy smoker for 30 to 40 years, he was able to quit several times. *Id.* An October 30, 2000 consultation note by Chainarong Limvarapuss, M.D. indicated that the Miner had a history of severe chronic obstructive pulmonary disease and had been oxygen dependent since 1996 and steroid dependent since October 1999. *Id.* The report also indicates that he had a 40 pack year smoking history. *Id.* Apart from noting pneumoconiosis, COPD, and other diagnoses and the Miner's smoking history, the hospital records do not discuss the etiology of the Miner's lung disease.

(4) The death certificate, signed by Dr. Saado, lists the immediate cause of the Miner's death on June 12, 2002 as "Cardiopulmonary Arrest" due to "Lung Cancer," which was in turn

due to “Pneumoconiosis” with “Chronic Obstructive Pulmonary Disease” as another significant condition contributing to death but not resulting in the underlying cause. (DX9). While tending to support a finding of pneumoconiosis, the death certificate is conclusory in nature and adds little to the equation, particularly in view of the fact that Dr. Saado’s records have been considered, above.

Evidence from the Miner’s claim is also of record in view of the consolidation of the two cases. However, as the medical opinions introduced during the earlier proceedings in the Miner’s claim (specifically, the opinions of Drs. Hippensteel, Paranthaman, and Robinette and the earlier opinion of Dr. Smiddy) were based upon less complete data, and the reviewing physicians did not have the benefit of the autopsy results, I find them to lack significant probative value. Moreover, of these physicians, only Dr. Hippensteel found that Claimant did not have pneumoconiosis and he did so based upon the x-ray evidence. In addition, the preponderance of the x-ray evidence from the Miner’s claim established pneumoconiosis. In fact, the Board affirmed Judge Donnelly’s finding that the Miner suffered from pneumoconiosis (although it vacated his finding that the Miner was totally disabled due to pneumoconiosis, and then affirmed Judge Kichuk’s finding to the contrary.) Thus, consideration of the evidence from the Miner’s claim, while tending to support a finding of pneumoconiosis, will not affect the outcome on this issue.

Overall, the other medical evidence in this case (including the hospital records and death certificate for this claim) supports a finding of pneumoconiosis.

**All Evidence on Pneumoconiosis.** In considering all of the evidence, favorable and unfavorable, I find that the evidence establishes the presence of pneumoconiosis under individual subsections (a)(1), (a)(2), and (a)(4) of section 718.202(a) as well as under the section as a whole. In this regard, it is worth noting that the autopsy evidence is considered the most reliable indicator of whether a decedent suffered from simple coal worker’s pneumoconiosis and here, it is undisputed that the autopsy evidence reflects that the Miner suffered from simple coal workers’ pneumoconiosis. *See Terlip v. Director, OWCP*, 8 B.L.R. 1-363 (1985). *See also Peabody Coal Co. v. McCandless*, 255 F.3d 465 (7th Cir. 2001). The only evidence that tends to suggest the contrary is x-ray evidence dating several years before the Miner’s death and medical opinions based upon such evidence. Taking into consideration all of the evidence on the issue of the existence of pneumoconiosis, I find that the Claimant has established that the Miner had pneumoconiosis as defined by the regulations.

### **Causal Relationship with Coal Mine Employment.**

Claimant is entitled to the presumption that the Miner’s pneumoconiosis arose out of his coal mine employment under section 718.203(b) as the parties have agreed that the Miner had at least 20 years of coal mine employment—in excess of the 10 years required for the presumption—and I have found that he suffered from pneumoconiosis. The presumption has not been rebutted.

## Causation of Miner's Death

Since this survivor's claim was filed after January 1, 1982, the issue of death due to pneumoconiosis is governed by 20 C.F.R. § 718.205(c). As amended, that subsection provides:

(c) For the purpose of adjudicating survivor's claims filed on or after January 1, 1982, death will be considered to be due to pneumoconiosis if any of the following criteria is met:

(1) Where competent medical evidence establishes that pneumoconiosis was the cause of the miner's death, or

(2) Where pneumoconiosis was a substantially contributing cause or factor leading to the miner's death or where the death was caused by complications of pneumoconiosis, or

(3) Where the presumption set forth at § 718.304 [relating to complicated pneumoconiosis] is applicable.

(4) However, survivors are not eligible for benefits where the miner's death was caused by a traumatic injury or the principal cause of death was a medical condition not related to pneumoconiosis, unless the evidence establishes that pneumoconiosis was a substantially contributing cause of death.

(5) Pneumoconiosis is a "substantially contributing cause" of a miner's death if it hastens the miner's death.

20 C.F.R. § 718.205(c) (2001). Subsection (5) was added when the regulations were amended. Under existing precedent in the Fourth Circuit (and elsewhere), consistent with new subsection (5), any condition that hastens a miner's death is a substantially contributing cause of death. *Shuff v. Cedar Coal Co.*, 967 F.2d 977 (4th Cir. 1992), *cert. denied*, 506 U.S. 1050 (1993); *see also Piney Mountain Coal Co. v. Mays*, 176 F.3d 753, 757-62 (4th Cir. 1999); *Brown v. Rock Creek Mining Company, Inc.*, 996 F.2d 812, 816 (6th Cir. 1993); *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093, 1099 (4th Cir. 1993); *Lukosevicz v. Director, OWCP*, 888 F.2d 1001, 1006 (3rd Cir. 1989). Thus, the standards are the same under the new and old regulations.

In weighing the medical evidence, I note that the United States Court of Appeals for the Fourth Circuit permits a finder of fact to give the opinion of an examining physician "especial consideration" when it is evaluated, although one cannot go so far as to "mechanistically" afford such opinion greater weight than that of a non-examining physician. *Millburn Colliery Co. v. Hicks*, 138 F.3d 524 (4th Cir. 1998); *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 441 (4th Cir. 1997) (citing *Grizzle v. Pickands Mather & Co.*, 994 F.2d 1093 (4th Cir. 1993)).

Similarly, the report of a non-examining physician cannot be discredited simply because the doctor did not examine the claimant, but the amount of weight given to a medical opinion is a decision left to the finder of fact. *See, e.g., Cole v. East Kentucky Collieries*, 20 B.L.R. 1-51, 1-55 (1996). The new regulation appearing at 20 C.F.R. §718.104(d) allows additional weight to be given to the opinion of a treating physician but requires certain factors, including the nature and duration of the relationship, the frequency of treatment, and the extent of treatment, to be considered.

At the outset, I note that since the Claimant has not established the presence of complicated pneumoconiosis, she has failed to establish death due to pneumoconiosis pursuant to section 718.205(c)(3). There is also no evidence establishing that the Miner's pneumoconiosis was the direct cause of death (as opposed to a contributing cause) under subsection (c)(1).

Extended discussion is unnecessary because, apart from the death certificate, there is essentially no evidence of record establishing that the Miner's death was caused, contributed to, or hastened by pneumoconiosis. Although the death certificate by Dr. Saado lists chronic obstructive pulmonary disease and pneumoconiosis as contributing factors to the Miner's death, no explanation has been provided as to the mechanism involved, and the death certificate does not indicate that either pneumoconiosis or COPD was a "substantially contributing cause or factor leading to the miner's death", that either condition hastened the Miner's death, or that death was caused by complications from either condition. This conclusory document is of limited probative value. *See Bill Branch Coal Co. v. Sparks*, 213 F.3d 186 (4th Cir. 2000). *See also Smith v. Camco Mining, Inc.*, 13 B.L.R. 1-37 (1989); *Addison v. Director, OWCP*, 11 B.L.R. 1-68 (1988).

The medical opinions of record are discussed above, and none of them indicate that either clinical or legal pneumoconiosis caused, contributed to, or hastened the Miner's death. While remarking that coal mine dust did not cause lung cancer, Dr. Fino did not address the issue of what caused the Miner's death. Apart from the references in the death certificate, discussed above, neither of the Claimant's treating physicians (Dr. Saado and Dr. Smiddy) addressed the issue either. Similarly, the autopsy report by Dr. Segen, while listing diagnoses including coal workers' pneumoconiosis, does not comment upon the actual cause of death.

Only reviewing pathologist Dr. Naeye addressed the issue, and he stated:

. . . By itself the CWP is not severe enough to have caused any abnormalities in lung function, any disability or to have had a significant role in his death. . .

Dr. Naeye agreed with Dr. Fino that lung cancer is not caused by coal mine dust. However, while finding it did not play a "significant role," he did not discuss whether the CWP played any role, as a contributing or hastening factor, in the Miner's death. Moreover, Dr. Naeye opined that the Miner's disability was mainly the consequence of his severe centrilobular emphysema and less severe chronic bronchitis, but he did not comment upon whether either condition contributed to or hastened his death. While commenting that cigarette smoking plays a greater role in the genesis of both conditions, he did not indicate whether the Miner's 20 plus years of coal mining substantially contributed to or aggravated either condition. Dr. Naeye's report is

thus incomplete. However, it is the only report addressing the issue of the causation of the Miner's death, and it does not support a finding that either clinical or legal pneumoconiosis played any part in the Miner's demise.

As I have already found the death certificate alone is insufficient to establish cause of death, and there is nothing else to support Claimant's theory of causation, the Claimant cannot establish that the Miner's death was due to pneumoconiosis under section 718.205(c).

As the Claimant cannot establish the necessary elements of a claim for survivor's benefits under Part 718, the Widow's claim must fail.

## **Miner's Claim**

### **Modification**

The Miner's claim involves a threshold issue – whether there has been a change in conditions or mistake in determination of fact so as to give rise to modification under 20 C.F.R. §725.310 (1999). Because the claim giving rise to the modification request was filed in 1997, the regulations in effect prior to their December 2000 amendment are applicable.

The standards for granting a request for modification of a previous denial of benefits, as the Claimant seeks here, are set forth in the regulations at 20 C.F.R. §725.310(a) (1999). That regulation states, in pertinent part:

Upon . . . the request of any party on grounds of a change in conditions or because of a mistake in a determination of fact, the deputy commissioner [district director] may, . . . at any time before one year after the denial of a claim, reconsider the terms of an award or denial of benefits.

To establish a basis for modification, a claimant must either establish a change in conditions or a mistake in a determination of fact, as provided in 20 C.F.R. §725.310 (1999). To determine whether there has been a change in conditions, the administrative law judge must “perform an independent assessment of the newly submitted evidence, considered in conjunction with the previously submitted evidence, to determine if the weight of the new evidence is sufficient to establish the element or elements which defeated entitlement in the prior decision.” *Napier v. Director, OWCP*, 17 B.L.R. 1-111, 113 (1993); *Natolini v. Director, OWCP*, 17 B.L.R. 1-82, 1-84 (1993). An administrative law judge may grant modification premised upon a mistake in determination of fact based upon an allegation that the ultimate fact was mistakenly decided; “[t]here is no need for a smoking-gun factual error, changed conditions, or startling new evidence.” *Jessee v. Director, OWCP*, 5 F.3d 723, 725 (4th Cir. 1993). The *Jessee* court continued by explaining that, in looking for a mistake in fact: “No new evidence is required. A claims examiner may ‘correct mistakes of fact, whether demonstrated by wholly new evidence, cumulative evidence, or merely further reflection on the evidence initially submitted.’” *Id.* at 724 (quoting *O’Keeffe v. Aerojet-General Shipyards, Inc.*, 404 U.S. 254, 256 (1971) (per curiam) (decided under Longshore and Harbor Workers' Compensation Act)). If a basis for modification is found, the claim must be considered on the merits, based upon all the evidence of record. *See*

*Kovac v. BCNR Mining Corp.*, 14 B.L.R. 1-156, 1-158 (1990), *modified on recon.*, 16 B.L.R. 1-71, 73 (1992).

In the instant case, the Miner's claim was ultimately denied based upon his failure to establish disability causation. Thus, my initial focus is whether, based upon the newly submitted evidence, considered in conjunction with the previously submitted evidence, the Claimant has established disability causation.

### **Change in Conditions: Disability Causation**

After establishing that the miner was totally disabled, a claimant must still establish that the miner's total disability was caused by pneumoconiosis arising out of coal mine employment. 20 C.F.R. §718.204(a).<sup>12</sup> If the presumptions are not available to a claimant, that claimant must prove the etiology of the disability by a preponderance of the evidence, even if he or she has proven the existence of total disability. *See Tucker v. Director*, 10 B.L.R. 1-35, 1-41 (1987). Under subsection 718.204(c)(1) ("*Total disability due to pneumoconiosis defined*"), a claimant must show that "pneumoconiosis . . . is a substantially contributing cause of the miner's totally disabling respiratory or pulmonary impairment," which means that it had a material adverse effect on the miner's respiratory or pulmonary condition or that it materially worsened a totally disabling respiratory or pulmonary impairment caused by a disease or exposure unrelated to coal mine employment. 20 C.F.R. § 718.204(c)(1). Thus, the revised regulations allow for a finding of total disability due to pneumoconiosis even when there is another totally disabling respiratory or pulmonary condition from another cause if pneumoconiosis materially worsened the impairment. *See* 20 C.F.R. § 718.204 (2001).

Under the old regulations, the U.S. Court of Appeals for the Fourth Circuit held that a miner's pneumoconiosis must be at least a "contributing cause" of his or her totally disabling pulmonary impairment. *Jewell Smokeless Coal Corp. v. Street*, 42 F.3d 241 (4th Cir. 1994); *Hobbs v. Clinchfield Coal Co.*, 917 F.2d 790 (4th Cir. 1990); *Robinson v. Pickands Mathur & Co.*, 914 F.2d 35 (4th Cir. 1990). In *Robinson*, the Fourth Circuit explained, based upon the old version of the regulations, that the pneumoconiosis must be a necessary condition of a miner's disability, and if he would have been disabled to the same degree and by the same time in his life if he had never been a miner, then benefits should not be awarded. Thus, the portion of the new regulations found not to be impermissibly retroactive effects a slight change in this element.

The Benefits Review Board had an opportunity to examine this new provision in *Gross v. Dominion Coal Corp.*, BRB No. 03-0118 BLA (Benefits Review Board, Oct. 29, 2003) (to be published).<sup>13</sup> In that decision (slip op. at 6 to 7), the Board held that an opinion (by Dr.

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<sup>12</sup> Under the amended regulations, as set forth in the second sentence of section 718.204(a), the finder-of-fact must not take into account any non-pulmonary or non-respiratory impairments a miner may have when making this determination, unless said condition causes a chronic respiratory or pulmonary impairment. 20 C.F.R. §718.204(a). As noted above, in *National Mining Assn. v. Dept. of Labor*, 292 F.3d 849 (D.C. Cir. 2002), the U.S. Court of Appeals for the D.C. Circuit found that provision to be impermissibly retroactive. In view of that holding, the Department of Labor further amended the regulations to provide that the provision is only applicable to claims filed after January 19, 2001. 20 C.F.R. §718.2. It is therefore inapplicable to the Miner's claim, which was filed in 1997.

<sup>13</sup> The decision is available on the BRB website, which may be accessed via a link from the OALJ website, [www.oalj.dol.gov](http://www.oalj.dol.gov).

Forehand) stating that pneumoconiosis was one of two causes of the miner's totally disabling pulmonary condition, but which did not attempt to specify the relative contributions of coal dust exposure and cigarette smoking, was sufficient to satisfy the new standard. The Board found that the doctor's opinion satisfied that "material adverse effect" requirement.<sup>14</sup> However, in *Phillips v. Westmoreland Coal Co.*, 2002-BLA-05289, BRB No. 04-0379 BLA (BRB Jan. 27, 2005) (unpub.) (slip op. at 3 to 4), the Board stated that the physician must discuss the other possible etiological factors for this provision to come in to play.

The new evidence relevant to the issue of disability causation consists of the autopsy evidence, medical opinion evidence, and medical and hospital records discussed above. However, a review of that evidence indicates that only Drs. Naeye and Fino actually discussed the issue of whether the Miner was disabled by his coal mine employment.

As noted above, Dr. Naeye opined that "[b]y itself the CWP is not severe enough to have caused any abnormalities in lung function, [or] any disability." Further, while Dr. Naeye opined that the Miner's disability was mainly the consequence of his severe centrilobular emphysema and less severe chronic bronchitis, and noted that in general cigarette smoking plays a greater role in the genesis of both conditions, he did not indicate whether the Miner's 20 plus years of coal mining substantially contributed to or aggravated either condition. Some of the data he cites would appear to support such an association in general, but he has not gone so far as to establish a nexus between the Miner's coal mine employment and his disability in the instant case.<sup>15</sup> Thus, Dr. Naeye's opinion does not establish disability causation.

Dr. Fino unequivocally stated that the Miner was "disabled because of obstructive lung disease and lung cancer due to smoking" and "[c]oal mine dust inhalation played no role, whatsoever, in his disability." Dr. Fino appears to be focusing on "legal pneumoconiosis" as opposed to "clinical pneumoconiosis" but his comments are broad enough to cover any pulmonary or respiratory impairment caused or contributed to by coal mine employment. In view of Dr. Fino's failure to review the autopsy results, his opinion has limited probative value with respect to the cause of the Miner's disability. Nevertheless, it supports a finding that cigarette smoking was the cause and coal mine dust exposure or pneumoconiosis played no role.

The autopsy report does not address the issue of disability causation and the medical and hospital records do not do so either.

In view of the above, the new evidence tends to establish that the Miner's disability was unrelated to either clinical or legal pneumoconiosis. Moreover, the new evidence fails to establish that there was any disability associated with the Miner's pneumoconiosis. When taken

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<sup>14</sup> The Board also found that substantial evidence supported the administrative law judge's discrediting of the opinion offered by the employer's expert (Dr. Castle) under *Sterling Smokeless Coal Co. v. Akers*, 131 F.3d 438, 21 B.L.R. 2-269 (4th Cir. 1997), which held that an administrative law judge should consider the explanation provided by an expert offering an opinion.

<sup>15</sup> Notably, in amending the regulations, the Department of Labor discussed the strong epidemiological evidence supporting an association between coal dust exposure and obstructive pulmonary disability (65 Fed. Reg. 79937-79945 (Dec. 20, 2000)), but it nevertheless chose to require that each individual claimant establish by a preponderance of the evidence that such an association occurred in that individual's case. *Id.* at 79938.

in connection with the evidence previously of record, disability causation has not been established.

### **Mistake in Determination of Fact**

I have also reviewed the prior decisions in this matter, including those portions of Judge Donnelly's decision that have been affirmed by the Board and the opinion by Judge Kichuk that was affirmed by the Board, taking into consideration the newly submitted evidence along with the evidence previously of record. I find no mistake in determination of fact in those decisions and the newly submitted evidence does not change my finding. Accordingly, there is no basis for modification based upon a mistake in determination of fact.

### **CONCLUSION**

Both claims fail. Inasmuch as the Claimant cannot establish a change in conditions or a mistake in determination of fact, so as to establish a basis for modification of the denial of the Miner's claim, the Miner's claim fails. Further, as the Claimant has failed to establish that the Miner's death was caused by pneumoconiosis, a requisite condition of entitlement, the Widow's claim fails. A separate discussion and analysis of the remaining issues raised in these claims is therefore unnecessary.

### **ORDER**

**IT IS HEREBY ORDERED** that the modification request and claim for black lung benefits of Lynetta L. Turner on behalf of the deceased miner Eugene Turner be, and hereby is, **DENIED**; and

**IT IS FURTHER ORDERED.** that the claim of Lynetta L. Turner for survivor's benefits under the Act be, and hereby is, **DENIED**.

**A**

PAMELA LAKES WOOD  
Administrative Law Judge

Washington, DC

**NOTICE OF APPEAL RIGHTS:** Pursuant to 20 C.F.R. § 725.481, any party dissatisfied with this Decision and Order may appeal it to the Benefits Review Board within thirty (30) days from the date of this Decision and Order by filing a Notice of Appeal with the Benefits Review Board at P.O. Box 37601, Washington, D.C. 20013-7601. A copy of the Notice of Appeal must also be served on the Associate Solicitor for Black Lung Benefits at the Frances Perkins Building, 200 Constitution Avenue, N.W., Room N-2117, Washington, D.C. 20210.

